

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES KESTER,

Plaintiff,

v.

KOKOR, et al.,

Defendants.

No. 2:20-cv-1516 AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF Nos. 2, 7. Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
2 § 1915(b)(2).

### 3 II. Statutory Screening of Prisoner Complaints

4 The court is required to screen complaints brought by prisoners seeking relief against a  
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
6 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
7 "frivolous, malicious, or fail[] to state a claim upon which relief may be granted," or that "seek[]  
8 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

9 A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact."  
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
11 Cir. 1984). "[A] judge may dismiss . . . claims which are 'based on indisputably meritless legal  
12 theories' or whose 'factual contentions are clearly baseless.'" Jackson v. Arizona, 885 F.2d 639,  
13 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as  
14 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a  
15 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.  
16 Franklin, 745 F.2d at 1227-28 (citations omitted).

17 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the  
18 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of  
19 what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550  
20 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
21 "Failure to state a claim under § 1915A incorporates the familiar standard applied in the context  
22 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." Wilhelm v. Rotman,  
23 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure  
24 to state a claim, a complaint must contain more than "a formulaic recitation of the elements of a  
25 cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the  
26 speculative level." Twombly, 550 U.S. at 555 (citations omitted). "[T]he pleading must contain  
27 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally  
28 cognizable right of action." Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur

1 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
3 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
4 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
5 content that allows the court to draw the reasonable inference that the defendant is liable for the  
6 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this  
7 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.  
8 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the  
9 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,  
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

### 11 III. Complaint

12 The complaint alleges that defendants Kokor, Johal, Sommer, Tortorice, and California  
13 Correctional Health Care Services (CCHCS) violated plaintiff’s rights under the Eighth  
14 Amendment. ECF No. 1. Plaintiff alleges that he suffers from degenerative disc syndrome and  
15 that in June 2019 defendant Kokor discontinued his prescription for gabapentin for no reason and  
16 the prescription was never replaced, leaving him with chronic pain. Id. at 3-4. He further alleges  
17 that “defendants CCHCS” and “CCHCS physicians” have denied him treatment for his condition  
18 and failed to provide him with corrective surgery. Id. at 3-5.

### 19 IV. Claims for Which a Response Will Be Required

20 The allegation that defendant Kokor discontinued plaintiff’s pain medication without  
21 cause and without prescribing a replacement is sufficient to state a claim for relief and will  
22 require a response. See Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citation omitted)  
23 (deliberate indifference shown by a purposeful act or failure to respond to plaintiff’s pain or  
24 medical need and harm caused by indifference).

### 25 V. Failure to State a Claim

#### 26 A. Defendant CCHCS

27 “[A]n unconsenting State is immune from suits brought in federal courts by her own  
28 citizens.” Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) (citations omitted). “Will[ v. Mich.

1 Dep't of State Police, 491 U.S. 58 (1989)] establishes that the State and arms of the State, which  
 2 have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in  
 3 either federal court or state court.” Howlett v. Rose, 496 U.S. 356, 365 (1990). As an arm of the  
 4 State, CCHCS is therefore immune from suit.

5 B. Personal Involvement

6 The complaint fails to identify any actions by defendants Johal, Sommer, and Tortorice.  
 7 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or  
 8 connection between a defendant's actions and the claimed deprivation, Rizzo v. Goode, 423 U.S.  
 9 362, 371, 376 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980), and plaintiff has not  
 10 alleged any facts showing the necessary personal involvement by any of these defendants.

11 VI. Leave to Amend

12 For the reasons set forth above, the court finds that the complaint does not state  
 13 cognizable claims against defendants CCHCS, Johal, Sommer, and Tortorice. However, it  
 14 appears that plaintiff may be able to allege facts regarding the involvement of defendants Johal,  
 15 Sommer, and Tortorice, and he will be given the opportunity to amend the complaint if he desires.  
 16 Plaintiff may proceed forthwith to serve defendant Kokor on his deliberate indifference claim or  
 17 he may delay serving any defendant and amend the complaint.

18 Plaintiff will be required to complete and return the attached notice advising the court how  
 19 he wishes to proceed. If plaintiff chooses to amend the complaint, he will be given thirty days to  
 20 file an amended complaint. If plaintiff elects to proceed on his claim against defendant Kokor  
 21 without amending the complaint, the court will proceed to serve the complaint. A decision to go  
 22 forward without amending the complaint will be considered a voluntarily dismissal without  
 23 prejudice of the claims against defendants CCHCS, Johal, Sommer, and Tortorice.

24 If plaintiff chooses to file an amended complaint, he must demonstrate how the conditions  
 25 about which he complains resulted in a deprivation of his constitutional rights. Rizzo v. Goode,  
 26 423 U.S. 362, 370-71 (1976). Also, the complaint must allege in specific terms how each named  
 27 defendant is involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981).  
 28 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or

1 connection between a defendant's actions and the claimed deprivation. Id.; Johnson v. Duffy,  
 2 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague and conclusory allegations of official  
 3 participation in civil rights violations are not sufficient." Ivey v. Bd. of Regents, 673 F.2d 266,  
 4 268 (9th Cir. 1982) (citations omitted).

5 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make  
 6 his amended complaint complete. Local Rule 220 requires that an amended complaint be  
 7 complete in itself without reference to any prior pleading. This is because, as a general rule, an  
 8 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.  
 9 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th  
 10 Cir. 2012) (claims dismissed with prejudice and without leave to amend do not have to be re-pled  
 11 in subsequent amended complaint to preserve appeal). Once plaintiff files an amended complaint,  
 12 the original complaint no longer serves any function in the case. Therefore, in an amended  
 13 complaint, as in an original complaint, each claim and the involvement of each defendant must be  
 14 sufficiently alleged.

#### 15 VII. Plain Language Summary of this Order for a Pro Se Litigant

16 Your request to proceed in forma pauperis is granted and you are not required to pay the  
 17 entire filing fee immediately.

18 Some of the allegations in the complaint state claims against the defendants and some do  
 19 not. You have stated a claim for deliberate indifference against defendant Kokor, who will be  
 20 required to respond to the complaint. You have not stated any claims against defendants CCHCS,  
 21 Johal, Sommer, and Tortorice because CCHCS cannot be sued and you have not explained what  
 22 Johal, Sommer, and Tortorice did or did not do that you believe violated your rights.

23 You have a choice to make. You may either (1) proceed immediately on your claim  
 24 against Kokor and voluntarily dismiss your claims against the other defendants or (2) try to  
 25 amend the complaint. If you want to go forward without amending the complaint, you will be  
 26 voluntarily dismissing without prejudice your claims against defendants CCHCS, Johal, Sommer,  
 27 and Tortorice. If you choose to amend your complaint, the amended complaint must include all  
 28 of the claims you want to make, including the ones that have already been found to state a claim,

1 because the court will not look at the claims or information in the original complaint. **Any claims**  
2 **not in the amended complaint will not be considered.** You must complete the attached  
3 notification showing what you want to do and return it to the court. Once the court receives the  
4 notice, it will issue an order telling you what you need to do next (i.e. file an amended complaint  
5 or wait for defendants to be served).

6 In accordance with the above, IT IS HEREBY ORDERED that:

7 1. Plaintiff's request for leave to proceed in forma pauperis, ECF No. 2, is GRANTED.


8 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
9 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
10 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
11 Director of the California Department of Corrections and Rehabilitation filed concurrently  
12 herewith.

13 3. Plaintiff's claims against defendants CCHCS, Johal, Sommer, and Tortorice do not  
14 state claims for which relief can be granted.

15 4. Plaintiff has the option to proceed immediately on his deliberate indifference claim  
16 against defendant Kokor as set forth in Section IV above, or to amend the complaint.

17 5. Within fourteen days of service of this order, plaintiff shall complete and return the  
18 attached form notifying the court whether he wants to proceed on the screened complaint or  
19 whether he wants to file a first amended complaint. If plaintiff does not return the form, the court  
20 will assume that he is choosing to proceed on the complaint as screened and will recommend  
21 dismissal without prejudice of the claims against defendants CCHCS, Johal, Sommer, and  
22 Tortorice.

23 DATED: July 19, 2021

24   
25 ALLISON CLAIRE  
26 UNITED STATES MAGISTRATE JUDGE  
27  
28

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PLAINTIFF'S NOTICE ON HOW TO  
PROCEED

Check one:

\_\_\_\_\_ Plaintiff wants to proceed immediately on his deliberate indifference claim against defendant Kokor without amending the complaint. Plaintiff understands that by going forward without amending the complaint he is voluntarily dismissing without prejudice his claims against defendants CCHCS, Johal, Sommer, and Tortorice pursuant to Federal Rule of Civil Procedure 41(a).

\_\_\_\_\_ Plaintiff wants to amend the complaint.

DATED: \_\_\_\_\_

\_\_\_\_\_  
James Kester  
Plaintiff pro se